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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 1060

CHICAGO AUTOMOBILE TRADE ASSOCIATION, ET AL.,

Petitioners,

vs.

ROSS M. MADDEN, REGIONAL DIRECTOR, THIRTEENTH REGION, NATIONAL LABOR RELATIONS BOARD, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

FREDERICK W. TURNER, JR.,
KARL W. GRABEMANN,
134 South La Salle Street,
Chicago, Illinois 60603,
Attorneys for Petitioners, Chicago Automobile Trade Association, et al.

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The petitioners pray that a writ of certiorari issue to review the judgment of the Court of Appeals for the Seventh Circuit entered in this case on February 18, 1964.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 23-28) has not been published in the Reports. The decision of the district court (App. A, *infra*, pp. 30-38; B. A. 98-106)[1] is reported at 215 F. Supp. 828.

1. "B. A." refers to the separate printed Appendix to Appellant's Brief in the court of appeals, and "P. A." refers to the printed Appendix bound with petitioner's brief in the court of appeals.

JURISDICTION

The judgment of the court of appeals was entered on February 18, 1964 (App. A, *infra*, p. 29). Petitioners' petition for rehearing (App. A, *infra*, pp. 39-45) was denied on April 4, 1964. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

(1) Whether a violation of the Administrative Procedure Act by the National Labor Relations Board in an unfair labor practice hearing permits a federal district court to assume jurisdiction.

(2) Whether Sections 10(e) and (f) of the National Labor Relations Act, as amended, afford an exclusive and adequate review procedure which precludes equitable intervention by a federal district court to fashion a remedy against conduct by the NLRB which violates the Administrative Procedure Act.

STATUTES INVOLVED

The relevant statutory provisions are set forth in App. B., *infra*, pp. 46-48.

STATEMENT.

A. EVENTS PRECEDING THE FILING OF THE INSTANT SUIT.

The petitioners are Chicago Automobile Trade Association, an Illinois, not-for-profit corporation;[2] and seven of its automobile-dealer members.[3] On May 4, 1962, Ross M. Madden, the Regional Director for the Thirteenth Region of the National Labor Relations Board[4] issued separate complaints against five automobile dealer-members of the Association (Elmwood Ford Motors, Inc., Oak Park Motors, Inc., Caley Brothers, Inc., Superior Motor Sales, Inc., and Fencl-Bogan Chevrolet, Inc.), alleging that these had engaged in unfair labor practices in violation of the National Labor Relations Act, as amended.[5] That same day, the Regional Director also issued an order directing that the separate complaints be consolidated, and a consolidated hearing was scheduled (App. A, *infra*, p. 31; B. A. 3-4, 13-42).

On June 13, 1962, the Regional Director issued a complaint against the Association alleging that it was violating the NLRA by assisting and inducing certain of its automobile-dealer members (namely the five against whom complaints had already issued) to refuse to bargain with certain unions. On June 22, the Regional Director issued an order consolidating the complaint against the Association with the complaints previously consolidated, and scheduled the matter for hearing (App. A, *infra*, p. 31; B. A. 4, 43-50).

2. Hereinafter referred to as the Association.
3. Hereinafter referred to by their trade names.
4. Hereinafter referred to as the Board.
5. Hereinafter referred to as the NLRA.

On July 30, 1962, a hearing on the consolidated complaints opened in Chicago, Illinois, before Trial Examiner Arthur E. Reyman. Early in the hearing, the Association moved to dismiss the complaint against it for the reason that the Board was without jurisdiction over the Association. This motion was granted; the Trial Examiner dismissed the complaint against the Association. However, on immediate appeal to the Board by its attorneys, the Board reversed the Trial Examiner's ruling. In reversing the Trial Examiner, the Board ordered that the complaint against the Association be reinstated so as to give its attorneys further opportunity to present evidence against the Association.[6] The hearing then continued on the consolidated complaints (App. A, *infra*, pp. 31-32; B. A. 4-5).

On October 25, 1962, the Regional Director issued a complaint against another automobile-dealer member of the Association, Grill-Sadler Lincoln-Mercury, Inc., and on October 30, a complaint issued against Kole Pontiac, Inc., also an automobile-dealer member of the Association. Neither of these entities were parties to the original consolidated hearing that had commenced July 30, and separate, independent hearings were scheduled in both of these most recent cases (App. A, *infra*, p. 32; B. A. 5, 59-72).

On December 12, 1962, when the record in the consolidated proceeding that had commenced July 30 consisted of 100 exhibits and about 1,800 pages of testimony—most of which had been elicited by the Board as adverse party testimony—Trial Examiner Reyman adjourned the hearing *sine die* (App. A, *infra*, p. 32; B. A. 5). Immediately before the Trial Examiner did so, however, the following conversation was recorded on the record between the Trial

6. Before the Trial Examiner dismissed the complaint against the Association, the Trial Examiner had earlier ruled to sever the Association's case from the other cases with which it had been consolidated. However, the Board here also reversed the Trial Examiner upon immediate appeal to it by its attorneys (P. A. 4).

Examiner; Albert Gore, counsel for one of the unions that had filed charges against the Association and the automobile-dealer members involved in the consolidated hearing; and Frederick W. Turner, Jr., counsel for the respondents in the hearing (B. A. 82-84):

> Trial Examiner: * * * I don't want to get involved here any more. Do you know what I am about to do, on the ground that I have been abused personally, have been insulted by counsel, that I cannot physically keep up with this case, and I am just about to remove myself. And if you don't want me to leave, I will stay and do the job the best I can. If you continue to abuse and insult me and disregard my rulings, I quit. * * *
>
> Mr. Gore: Mr. Examiner, I do not abuse or insult your rulings. And if you choose to withdraw yourself, I would be in agreement with it.
>
> Mr. Turner: I think, Mr. Trial Examiner, if I may say so, and I say this carefully and upon a considered basis, that the observations that you made yesterday with respect to the conduct of Mr. Gore are not only proper and appropriate, but further, that while the record unfortunately cannot reflect his contemptuous conduct in person, we who have sat in this courtroom and have seen the grimaces, the contemptuous expressions on his face, his pacing up and down upon the floor, and other actions in connection therewith, know as reasonable people that he is indeed contemptuous of the Trial Examiner and of these proceedings. And I think the record should show this. It isn't so much what Mr. Gore says, it is how he says it.
>
> Mr. Gore: Mr. Examiner—
>
> Trial Examiner: Now I am through.
>
> Mr. Gore: Mr. Examiner, I object to those statements, and move that they be stricken.
>
> Trial Examiner: I don't care whether you object to them or not. I am inclined to agree. So far as I am concerned, if counsel who have threatened to file affidavits of bias and prejudice against me care to do so, they may do so, and I will rule upon them.
>
> Mr. Gore: No such threat was made—

Trial Examiner: On immendo. And on the basis of my personal health, I am through with this case as of now.

The case is adjourned sine die.

You are excused, Mr. [Witness].

Mr. Turner: Mr. Trial Examiner, I should like you to withdraw that motion or your ruling, whatever it may be.

There have been hours, days, weeks, months spent, not only in the trial of these matters, but in the consideration of these matters by the Trial Examiner. And in the interest of the parties both for the General Counsel, and the Charging Parties, and the Respondent, I think it would be a miscarriage of justice for you to retire at this stage of the proceedings.

Trial Examiner: The record is closed.

The hearing is adjourned sine die. You are excused, Mr. [Witness]; all witnesses under subpoena are excused so far as I am concerned.

(Whereupon, at 2:40 o'clock, Wednesday, December 12, 1962, the hearing in the above-entitled matter was adjourned sine die.)

On January 4, 1963, in the absence of prior notice, the Regional Director issued an order consolidating the complaint in the *Kole* case with the other cases previously consolidated and adjourned *sine die*. While the respondents in all of the then consolidated cases objected to this further consolidation for the reason, *inter alia*, that it was prejudicial to all the respondents then involved and that it constituted a deprivation of due process of law as to them, the Regional Director refused to reconsider the further consolidation (App. A, *infra*, p. 32; B. A. 5, 72-74).

On January 7, 1963, the Board's Chief Trial Examiner, George Bokat, wrote counsel for the parties in the adjourned consolidated cases that he had received Trial Examined Reyman's "notice of disqualification," as provided for in Section 102.37 of the Board's Rules and Regulations. Bokat advised that counsel were "hereby notified that

another Trial Examiner will be designated by me to serve in the place and stead of Mr. Reyman," and that a "trial *de novo*" would commence as to the consolidated complaints before the newly designated Trial Examiner on January 15, 1963, in Chicago, Illinois[7] (App. A, *infra*, p. 32; B. A. 5-6, 9-10, 85-86).

On January 9, 1963, when Bokat's letter of January 7 was received, Frederick W. Turner, Jr., wrote Bokat following a telephone conversation with him regarding the content of Bokat's letter. Bokat was reminded in Turner's letter of their conversation earlier that day wherein Bokat had been told that a scheduling of a trial *de novo* in the then consolidated cases "would unquestionably work to the prejudice of the [respondents then involved in the consolidated cases], who would thereby be deprived of due process of law"; that the transcript in the adjourned hearing contained some 1,800 pages of testimony, most of it from respondent's witnesses who had been interrogated by the Board's attorneys under Rule 43(b) of the Federal Rules of Civil Procedure as adverse parties; that the testimony elicited from the respondents' witnesses by the Board's attorneys had completely uncovered the respondents' defenses; that the complaint against the Association had been dismissed early in the consolidated hearing before Trial Examiner Reyman, but that he had been reversed by the Board so as to provide its attorneys a further opportunity to present evidence against the Association; and that the Association, at the time of the adjournment of the consolidated hearing, had been ready to again move the

7. Attached to Bokat's letter was the "notice of disqualification" referred to therein. In the "notice," which was dated December 18, 1962, and directed to the Chief Trial Examiner, it was stated by Trial Examiner Reyman that he was withdrawing from the adjourned hearing "deeming [himself] disqualified to further continue . . . for reasons concerning [his] personal health, as reflected by the stenographic transcript of the proceedings of December 12, 1962" (B. A. 87).

dismissal of the complaint against it inasmuch as the Board's attorneys had been afforded "more than an adequate opportunity to present their evidence". (B. A. 88-90). Bokat was respectfully requested, therefore, to reconsider his designation of another trial examiner to hear the consolidated cases *de novo*. Turner finished by requesting that (B. A. 90-91):

> [Bokat] permit Trial Examiner Reyman, the duly designated Trial Examiner to date in the [consolidated] cases, to retain control over such cases, at least to the point where, pursuant to the previous direction from the Board, that Trial Examiner may be permitted to pass upon the . . . Association's motion to dismiss the case pending against it. We sincerely believe that all of the respondents in the [consolidated] cases would be seriously prejudiced if this opportunity is not made available, and that all of the respondents would thereby be deprived of due process of law. Also to be considered, of course, is the tremendous financial expense that has already been incurred by all of the respondents in the [consolidated] cases, which expense would become very much greater in the event that all of the respondents need undergo a trial *de novo* when the possibility exists that this would not be necessary in the event of a favorable determination by Trial Examiner Reyman of the [Association's] motion to dismiss the case pending against it. You will also recall that [we] informed you this date that we could not possibly resume hearing in the [consolidated] cases on the date now designated, namely January 15. . . .
>
> After you have considered the matters raised herein, [we] would appreciate it if you would telephone [us] for a further discussion of the matters contained herein.

On January 14, 1963, the Regional Director amended the complaint in the case against the Association by adding two new paragraphs, which constituted a new theory of

violation (B. A. 75-76). Also, the Regional Director issued an order consolidating the Grill-Sadler case with the other consolidated cases. While all of the respondents objected to this further consolidation for the reason, *inter alia*, that it was prejudicial as to each of them and that it further deprived them of due process of law, the Regional Director refused to reconsider his order. The Regional Director did, however, reschedule hearing on the consolidated complaints from January 15 to January 22 (App. A. *infra*, pp. 32-33; B. A. 6, 77-80, 101).

On January 15, 1963, Turner wrote Bokat requesting that a conference be held in connection with the matters set forth in Bokat's January 7 letter. Accordingly, Bokat was requested to reschedule hearing in the consolidated cases from January 22 to January 29, thereby leaving sufficient time for a conference commencing January 22. Turner then advised that it was the "unequivocal position" of each of the respondents in the consolidated cases that they had been prejudiced by Bokat's decision to schedule a trial *de novo*; that each respondent believed he had been deprived of due process of law by virtue of the action reflected in Bokat's letter of January 7; and that it was hoped that through conference "some acceptable solutions might be found . . ." so that the respective rights of all parties might thereby be safeguarded" (B. A. 91-92).

On January 16, 1963, Bokat wrote Turner. In his letter, Bokat referred to Turner's request that the former reconsider his designation of another trial examiner to conduct a hearing *de novo* in the place of Reyman. In this connection Bokat alleged that (B. A. 94-95):

> Since Mr. Reyman had definitely decided to withdraw I had no choice other than to designate another Trial Examiner. Your suggestion that Mr. Reyman return to the case if only for the purpose of ruling on Respondent Association's motion to dismiss, since

you believe that the General Counsel was about to rest its case,[8] I explored with Mr. Reyman.

Mr. Reyman was torn between his duty, as he saw it, to complete the hearing and the fact that his health was being undermined by the abnormal tensions in this hearing. . . .

Under these circumstances, I suggested to Mr. Reyman that this was a medical problem and that he should seek the advice of his physician; that if his doctor would certify that he could continue with the hearing then I would redesignate him to resume the hearing. Accordingly, Mr. Reyman saw his physician on January 11, 1963, and reported to me that he asked him to certify that he was able to undertake an arduous hearing wherein he could expect to undergo considerable nervous strain. After the doctor finished his examination, he informed Mr. Reyman that he could not make such a statement.[9]

Under these circumstances . . . the case will go forward on January 22, 1963, before a newly designated Trial Examiner.

On January 18, 1963, the petitioners learned that Trial Examiner Reyman was then hearing the issues in other

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8. Counsel for the respondents in the consolidated hearing had previously expressed his belief to Bokat that, at the time Trial Examiner Reyman had adjourned the proceedings on December 12, 1962, the Board was about to rest its case (P. A. 6-7).

9. On January 14, 1963 Reyman had written Bokat from Cleveland, Ohio, stating that he had been examined, on January 11, in Washington, D. C., by John Gustafson, M.D., "upon my request that he certify that I would be able to undertake a hearing in a probably long and arduous hearing wherein I could expect to undergo considerable nervous strain. Upon completion of his examination, Dr. Gustafson told me that he would not make such a statement. . . ." Reyman's letter finished by advising Bokat that he had written Gustafson requesting that he "furnish a statement to Bokat based on his findings." On January 15, then, Dr. Gustafson wrote Bokat, "I gave Mr. Reyman a routine physical checkup in my office January 11, 1963, and on the basis of my findings advised him not to undertake work on the Chicago Automobile Trade Association case. * * * I prescribed for him medication and advised taking it easy" (B. A. 96-97).

unfair labor practice cases throughout the United States following his assignment to such cases by Chief Trial Examiner Bokat (App. A, *infra*, p. 35; P. A. 1-3).

B. The Instant Suit

(1) The Proceedings in the District Court

On January 18, 1963, petitioners filed suit in the United States District Court for the Northern District of Illinois, Eastern Division, praying that the Board be enjoined from proceeding with a trial *de novo* in the consolidated cases; that the Board's Chief Trial Examiner be ordered to reassign Trial Examiner Reyman to the adjourned hearing, "either singly or in concert with another Trial Examiner," and that Trial Examiner Reyman issue a decision thereafter; and that the district court enter such other relief as "equity may require" and the court "shall deem just and proper under the circumstances." The complaint alleged that the Board's action violated certain provisions of the Administrative Procedure Act[10] and the Fifth Amendment to the Constitution and that the court had jurisdiction under 28 U. S. C. 1337 (R. A. 3-8). A supporting affidavit was also filed with plaintiffs' complaint[11]

10. Hereinafter referred to as the APA. The sections of the APA alleged to have been interdicted by the Board's conduct were 5 USC 1004(d)(2) and (e), and 5 USC 1011.

11. In the affidavit accompanying the complaint, plaintiffs' counsel, Turner, stated, *inter alia*, that there had been no showing made by the Board that Trial Examiner Reyman, who had heard all the evidence to date in the adjourned proceeding before the Board, was "unavailable" to resume hearing; that during the month of January, 1963, Trial Examiner Reyman had already been assigned to at least three other unfair labor practice hearings throughout the United States, and that he had heard the issues in such cases; that the Board's action had the effect of affording it the opportunity to retry all the issues in the adjourned hearing, and to adduce additional evidence against the respondents therein in the face of a record showing that seven of the respondents' witnesses had been examined as adverse witnesses, thereby making

(P. A. 1-3). The Board moved to dismiss the complaint on the grounds, *inter alia*, that the district court lacked jurisdiction over the subject matter of the action and that the complaint failed to state a claim upon which relief could be granted; in the alternative, the Board moved for summary judgment in its favor (B. A. 12-13).

On April 11, 1963, after hearing, the district court enjoined the Board from conducting a trial *de novo* in the adjourned unfair labor practice cases and ordered the Board's Chief Trial Examiner to reassign Trial Examiner Reyman to reopen and complete the hearings he recessed *sine die* on December 12, 1962 (App. A, *infra*, p. 38). The court found that the facts showed that the Board's conduct, first, was in violation of the APA; second, that the natural and probable result of such conduct was to inflict irreparable injury to the plaintiffs; and third, that the plaintiffs lacked an adequate administrative or judicial remedy in the absence of district court intervention (App. A, *infra*, pp. 34-35).

With reference to the Board's violation of the APA, the district court held that the Board had violated Section 5(c) of the APA (App. B, *infra*, p. 46) inasmuch as the facts showed that Trial Examiner Reyman had conducted the hearings involving the plaintiffs; he had received the evidence and adjourned the hearings *sine die*. But he had since been assigned to and conducted other Board hearings. Thus, the court held that Trial Examiner Reyman was not "unavailable" to the Board and that in accordance with the provisions of the APA, "he must decide the outcome of the hearings, if they are to be decided." The court

their defense fully known to the Board; that the Board had since December 12, 1962, issued additional subpoenas requiring the production of evidence shown to be relevant in the adjourned hearing; and that, unless relief was granted by the district court, plaintiffs would be required to proceed to hearing to their irreparable injury, in denial of their rights to due process of law (P. A. 1-3).

also observed in this connection that it was "only fair also to observe . . . [that] the Board's action here in question was occasioned not so much by its solicitude for the Trial Examiner's health as by its fear of his unfavorable decision were he permitted to resume the case" (App. A, *infra*, pp. 35-36).

The district court held that irreparable injury to the plaintiffs was "manifestly patent." The court found that, inasmuch as the Board's Rules denied a right to discovery in unfair labor practice cases, a "manifest injustice" would result if the consolidated cases were to be retried. Inasmuch as a "great deal" of the transcript consisted of adverse party testimony from plaintiffs' witnesses interrogated by the Board, the court held that a trial *de novo* would place the plaintiffs "at an unfair disadvantage" in that the Board would, in effect, have obtained that which it would deny the plaintiff namely, the right to discovery. Finally, the court also discerned the possibility that the Board, were it permitted to conduct a trial *de novo* before another trial examiner and if it once more appeared that another trial examiner favored the plaintiffs, might again cause the hearings to be recessed *sine die*. The court considered this possibility "shocking, to say the least" (App. A, *infra*, pp. 36-37).

With reference to the absence of an adequate administrative or judicial remedy, the district court held that it was possible that the plaintiffs were without any remedy at all. In any event, the court held that the plaintiffs were without an administrative remedy since there was no right to interlocutory appeal. Hence, the court concluded, should the plaintiffs again be forced to represent themselves at a *de novo* hearing, and should the Board again prematurely terminate those hearings, as it had done, the action of the Board would be unappealable. This would also be the case, even if the findings of the Board were not adverse

to the plaintiffs. The court further held, on the other hand, that if the *de novo* hearing resulted in a final order finding the plaintiffs guilty of unfair labor practices, on recourse to the court of appeals for review of that order, that court could not redress the Board's wrong if it, too, found that the Board had contravened the APA (App. A, *infra*, p. 37).

In assuming jurisdiction in the instant case, the district court recognized that plaintiffs who complain of the conduct of administrative bodies have properly been required to exhaust their administrative remedies prior to invoking the intervention of the courts. But the court found this general rule subject to certain exceptions. Thus, the court pointed to the decision of the Supreme Court in *Leedom v. Kyne*, 358 U. S. 184, wherein this Court had recognized the possibility of such an exception. And then, in assuming jurisdiction, the court placed reliance on the decision of the Fourth Circuit Court of Appeals in *Deering-Milliken, Inc. v. Johnston*, 295 F. 2d 856, wherein it was held that the district courts did, under certain circumstances, have jurisdiction to enjoin the Board from proceeding with an unfair labor practice hearing. In the latter case, so the district court pointed out, the Board had violated the APA and that this, yoked with the "arbitrary and oppressive nature of its action, justified the District Court [in the *Deering-Milliken* case] in taking jurisdiction notwithstanding nonexhaustion of administrative remedies" (App. A, *infra*, pp. 33-34). In assuming jurisdiction in the instant case, Chief Justice Campbell concluded that (App. A, *infra*, p. 38):

> The futility of plaintiffs' position is apparent. If there is anything left of the inherent equity powers of the District Court, then I cannot now give judicial approbation to the Board's actions, nor can I stand by and allow this grossly unjust situation to continue and

develop within my District, mindful though I am of the general legislative policy against court intervention in labor disputes. To force plaintiffs to submit to a *de novo* hearing in light of the present facts would be to abrogate the fundamental principles of equity which I am sure the Congress never intended. I must and I do assume jurisdiction herein. . .

(2) The Proceedings in the Court of Appeals.

On February 18, 1964, after the submission of briefs to the court and oral argument, the Court of Appeals for the Seventh Circuit reversed the judgment order of the district court (App. A, *infra*, pp. 23-28). The court of appeals concluded that the district court had lacked jurisdiction of the subject matter and that it was unnecessary to consider the merits of the case before it or the conclusions reached by the court below; that Sections 10(e) and (f) of the National Labor Relations Act (App. B, *infra*, pp. 46-47) afforded petitioners an exclusive and adequate review procedure which precluded the exercise of equitable intervention by the district court; and that *Leedom* v. *Kyne*, 358 U. S. 184, was inapplicable to the instant case, which conclusion is in effect reinforced by the decision of this Court in *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U. S. 10[12] (App. A, *infra*, pp. 25-28).

REASONS FOR GRANTING THE WRIT.

The holding of the court of appeals misconceives the scope and or significance of this Court's decisions in *Leedom* v. *Kyne*, 358 U. S. 184; *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U. S. 10; and *Wong Yang Sung* v. *McGrath*, 339 U. S. 33; it has failed to

12. *Boire* v. *Greyhound Corporation*, 309 F. 2d 397 (C. A. 5), was pending on writ of certiorari when the instant case was determined by the court of appeals. The latter tribunal acknowledged in its decision that this was the fact (App. A, *infra*, p. 28, n. 6).

take into consideration and to apply the subsequent decision of this Court in *Boire* v. *Greyhound Corp.*, ____ U. S. ____ [55 LRRM 2694], handed down March 23, 1964. The holding of the court of appeals is also contrary to a decision of the Court of Appeals for the Fourth Circuit, and it raises a question of great importance to the future administration of the APA and the NLRA.

1. The Board's action in the instant case violated the APA. But the court of appeals ignored that fact in failing to pass upon the merits, and in failing to sanction district court jurisdiction over the subject matter of the action. In so doing, the court of appeals gave no weight, apparently, to certain legislative history of the APA, and to certain decisions of this Court with reference to the remedial character of the APA and the "plain duty" it imposes on the courts.

In the prefacing portions of the legislative history of the APA, Senator Pat McCarran, the "father of the APA," said at the time of its enactment that it constituted a "strongly marked" and "widely heralded advance in democratic government;" that it was to serve "as a comprehensive charter of private liberty and a solemn undertaking of official fairness." *APA Legislative History*, Sen. Document No. 248, 79th Cong., 2nd Sess., "Foreword." In the enactment of the APA, Congress was, of course, motivatingly concerned about the widespread demand that had arisen for the prescribing of procedural safeguards against the artificiality and arbitrariness with which administrative processes were getting to be stamped. *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 41. Cf. *Gamble-Skogmo* v. *F. T. C.*, 211 F. 2d 106, 114 (C. A. 8)

In its opinion in *Wong Yang Sung*, *ibid.*, this Court, in connection with the APA, stated at pages 40-41:

> . . . it would be a disservice to our form of government and to the administrative process itself if the courts

should fail, *so far as the terms of the Act warrant, to give effect to its remedial purposes where the evils it was aimed at appear.* [Emphasis added.]

In the same decision at page 45, this Court admonished even more strongly that:

> It is the *plain duty* of the courts, *regardless* of their views of the wisdom or policy of the Act, *to construe this remedial legislation to eliminate, so far as its text permits, the practices it condemns.* [Emphasis added. Cf. *Heikkila* v. *Barber*, 345 U. S. 229.]

The Board's violation of the APA in the instant case, yoked with the threat of irreparable injury to the petitioner and the lack of an adequate administrative or judicial remedy, raises the issue whether a violation of the APA precludes the assumption of jurisdiction by a federal district court to fashion a remedy against the Board's unlawful conduct. In the absence of such jurisdiction, it would not be possible for the courts to perform their "plain duty" toward the end that the practices condemned by the APA be eliminated. Where Board conduct in the course of a proceeding before it is violative of the APA so as to precipitate irreparable injury as a consequence, the absence of district court jurisdiction can hardly give effect to the remedial purposes of the APA. Thus, an absence of district court jurisdiction would frustrate and make meaningless the rights Congress has conferred through the enactment of the APA. Those Congressionally conferred rights, which this Court has characterized as "remedial legislation," could never be enforced. Without a remedy in conjunction with the rights conferred by the APA, the practices condemned therein would not, and could not, be eliminated.

2. In *Leedom* v. *Kyne*, 358 U. S. 184, this Court held that a federal district court had jurisdiction, under its general equity powers, of a suit brought by a labor organi-

zation to review and set aside Board action taken in excess of its statutory powers and contrary to prohibitions found in the NLRA. This Court there rejected the Board's argument that the review provisions of the NLRA provided an adequate and exclusive remedy by holding that the Board's unlawful conduct had inflicted an injury to the petitioners for which the law, apart from the review provisions of the NLRA, afforded a remedy. The suit initiated in the district court was viewed by this Court as one to strike down an unlawful order of the Board, and not as one to "review" in the sense of that term as used in the NLRA. In attempting an exercise of power that had been specifically withheld, this Court concluded that the Board had deprived petitioners of a right assured to them by Congress. Thus, to prevent deprivation of a right so given, it was held that a federal district court had jurisdiction of an original suit, for the absence of such jurisdiction would have meant a sacrifice of the right conferred by Congress with no other means within the petitioners' control to protect and enforce it. Finally, this Court further held that, where Congress had given a right, it must have intended that right to be enforceable, a purpose that the courts encountered no difficulty in fulfilling.

Thereafter, in *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U. S. 10, this Court pointed out that the scope of *Kyne* was limited, that its action in *Sociedad Nacional* was not to be taken as an enlargement of the exception fashioned in *Kyne*. Significantly, however, this Court upheld the assertion of district court jurisdiction in a situation involving the question of application of the laws of the United States to foreign-flag ships and their crews. It was noted in sanctioning the assumption of district court jurisdiction that the presence of public questions high in the scale of the national interest constituted a uniquely compelling justification for prompt judicial reso-

lution of the Board's power, which was here found to have exceeded permissible limits.

Subsequently, in *Boire* v. *Greyhound Corp.*, 376 U. S. [55 LRRM 2694], which was decided after the decision of the court of appeals in the instant case, this Court reversed the decision of the Fifth Circuit (309 F. 2d 397) and held that a federal district court lacked jurisdiction to enjoin a regional director of the Board from conducting an election based on a Board ruling that Greyhound was a joint employer with another company in relation to certain employees. In its opinion, this Court determined that *Greyhound* did not fall within the ambit of *Kyne*, and that no claim was made that the case was akin to *Sociedad Nacional*.

We recognize that this Court has painstakingly delineated the procedural boundaries of *Kyne* and that the exception created therein is a narrow one. However, as we read *Kyne*, it nevertheless represents authority for the proposition that federal district court intervention exists *as a possibility* in certain instances, and this can also be said of *Sociedad Nacional*. The petitioners do not contend that the facts in the instant case are such as to bring it within the procedural boundaries of *Kyne*. Nor do we contend that this case is akin to *Sociedad Nacional*. These latter cases are significant to the instant case in that they represent authority for the proposition that, in certain extraordinary circumstances, this Court has sanctioned direct review by a federal district court of Board proceedings. And then in *Kyne*, anyway, there are found certain elements analogous to this case, such as the violation by the Board of a Congressionally conferred right, for example, and the lack of an adequate administrative or judicial remedy. In any event, we submit that the court of appeals in the instant case misconceived the import of *Kyne* and *Sociedad Nacional* in that it failed to recognize that these

cases constitute the *possibility of an exception* to the general rule that federal district courts are without jurisdiction to review Board proceedings, and that such review may be had only under Sections 10(e) and (f) of the NLRA.

Where the Board has violated the strictures contained in the APA during the course of a proceeding before it thereby inflicting irreparable injury to the respondents therein, the review provisions contained in Section 10(e) and (f) of the NLRA are plainly inadequate. By making these provisions sacrosanct insofar as they are made exclusive, the Congressionally conferred rights guaranteed in the APA become meaningless; the practices condemned by the APA are encouraged and perpetuated, rather than eliminated. This Court should, therefore, examine the novel issue with reference to whether Sections 10(e) and (f) of the NLRA afford an exclusive and adequate review procedure which precludes equitable intervention by a federal district court to fashion a remedy against conduct by the NLRB which violates the APA. Based on some of the considerations it emphasized in *Leedom* v. *Kyne*, 385 U. S. 184, and also inasmuch as it created an entirely new and different exception to the general rule against district court intervention in *McCulloch* v. *Sociedad de Marineros de Honduras*, 372 U. S. 10, *without enlarging the exception in Kyne*, this Court should consider the possibility of another exception in instances where the Board, as here, has violated a mandatory provision of the APA.

3. The holding of the Seventh Circuit, that a district court is without jurisdiction and that it is unnecessary to consider the merits or the conclusions reached by the court below where that court had fashioned a remedy after finding that (1) the Board violated the APA in an unfair labor practice proceeding; (2) the plaintiffs would suffer irreparable injury as a consequence; and (3), there was no adequate administrative or judicial remedy available

to the plaintiffs in the absence of district court intervention, is in direct conflict with a decision of the Court of Appeals for the Fourth Circuit in *Deering-Milliken, Inc.* v. *Johnston*, 295 F. 2d 856 (C. A. 4).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted.

FREDERICK W. TURNER, JR.,
KARL W. GRABEMANN,
134 South La Salle Street,
Chicago, Illinois 60603.
Attorneys for Petitioners, Chicago Automobile Trade Association, et al.

APPENDIX A.

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

No. 14263 September Term, 1963—January Session, 1964

CHICAGO AUTOMOBILE TRADE ASSOCIATION, ET AL.,
Plaintiffs-Appellees,
v.
ROSS M. MADDEN, REGIONAL DIRECTOR, THIRTEENTH REGION, NATIONAL LABOR RELATIONS BOARD, ET AL.,
Defendants-Appellants.

On Appeal from an Order of the United States District Court for the Northern District of Illinois, Eastern Division.

February 18, 1964

Before HASTINGS, *Chief Judge*, CASTLE and KILEY, *Circuit Judges*.

CASTLE, *Circuit Judge*. The defendants-appellants, Ross M. Madden, the Regional Director of the Thirteenth Region of the National Labor Relations Board, et al.[1] prosecute

1. The additional defendants-appellants are George Bokat, the Chief Trial Examiner of the Board; an unnamed trial examiner designee of the Board; Lawrence D. Ehrlich, Robert L. McCabe and Robert P. Henderson, attorneys for the Board, who are assigned to the prosecution of complaints pending before the Board, consolidated for the purposes of hearing, charging plaintiffs with unfair labor practices.

this appeal from an order of the District Court enjoining and restraining the National Labor Relations Board, its officers, employees and agents from conducting a hearing *de novo* in consolidated unfair labor practice cases pending against plaintiffs-appellees and directing the Board and George Bokat, the Board's Chief Trial Examiner, to reassign trial examiner Arthur Reyman to re-open the hearings, which he had recessed *sine die*, to complete the same and to prepare and issue his Intermediate Report therein within one year.

Plaintiffs-appellees, Chicago Automobile Trade Association, and seven of the association's corporate automobile-dealer members,[2] instituted this action in the District Court against the defendants. Plaintiffs' complaint alleged, among other things, that after extensive hearings had before trial examiner Arthur Reyman, and with the Association's motion to dismiss the complaint against it still pending, Reyman adjourned the consolidated hearing *sine die* on December 12, 1962, and that defendant George Bokat notified the plaintiffs the hearing would commence *de novo* on January 15, 1963 (later changed to January 22, 1963) before a newly designated trial examiner to be named by Bokat. The complaint charged, in substance, that Reyman's disqualification of himself and withdrawal from the hearing of the consolidated cases "for reasons concerning my personal health" are unauthorized, that Reyman is not "unavailable"[3] within the meaning of Section 5(c) of the Ad-

2. Elmwood Ford Motors, Inc.; Oak Park Motors, Inc.; Caley Brothers, Inc.; Superior Motor Sales, Inc.; Fench-Bogan Chevrolet, Inc.; Kole Pontiac, Inc., and Grill-Sadler Lincoln-Mercury, Inc.

3. An affidavit filed in support of the complaint states, on information and belief, that Reyman has since been assigned to and has heard three other cases. Section 5(c) of the Administrative Procedure Act (5 U.S.C.A. § 1004(c)) provides that the same officer who presides at the reception of the evidence shall make the recommended or initial decision except where such officer becomes "unavailable to the agency."

ministrative Procedure Act (5 U.S.C.A. § 1006(c)), and that the order to proceed *de novo*:

> ". . . violates Section 11 of the Administrative Procedure Act (5 U.S.C.A. 1011) in that it violates the constitutional rights of plaintiffs to due process of law as guaranteed by Article V of the Constitution of the United States. Specifically, the order of the defendant George Bokat has the effect of affording the Board the opportunity to retry all issues against the plaintiffs, to adduce additional evidence against plaintiffs in the face of a record which shows that the Board examined seven of plaintiffs' witnesses as adverse witnesses under Rule 43(b) of the Federal Rules of Civil Procedure, and thereby disclosed to the Board all of the plaintiffs' defenses."

The defendants moved to dismiss the complaint on the grounds that the District Court was without jurisdiction over the subject matter of the action and that the complaint failed to state a claim upon which relief could be granted; in the alternative, defendants moved for summary judgment in their favor, presenting attached exhibits and affidavits in support of the motion.[4] The District Court denied defendants' motions and entered the order from which defendants appeal.

Our conclusion that the District Court lacked jurisdiction of the subject matter (*Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41; *Vapor Blast Manufacturing Company v. Madden*, 7 Cir., 280 F. 2d 205, 208-209) makes it unnecessary that we consider or discuss the merits of the contentions advanced by plaintiffs, or the conclusions of the District Court, with respect to the withdrawal of Reyman and

4. An affidavit by Chief Trial Examiner Bokat states that in assignments made to Reyman subsequent to his withdrawal from the consolidated hearing "I have sought to select cases which will not be long and factually complex, and which do not appear to have the potential for generating tension or a 'charged atmosphere' among the participants."

the rescheduling of the consolidated cases for *de novo*[5] hearing before another examiner.

We perceive nothing in the record before us which removes this case from the application of the doctrine expressed in *Myers* and applied by this Court in *Vapor Blast*. All of the issues raised by plaintiffs' complaint, including their assertion of denial of procedural due process, can be raised on review if the Board's ultimate disposition of the cases is adverse to any of the plaintiffs. The Board's decision and its order are subject to review before the Board's order can be enforced. Section 10 (e) and (f) of the National Labor Relations Act affords an exclusive and adequate review procedure which precludes exercise of equitable intervention by the District Court at this stage of the administrative proceeding.

The holding in *Myers* that the Act provides an exclusive and adequate review procedure is an important facet of the broader doctrine requiring exhaustion of administrative remedies. As Mr. Justice Brandeis stated in *Myers* (303 U. S. at 50-51) the assertion of district court jurisdiction to interfere with and enjoin unfair labor practice proceedings before the issuance of a final Board order "is at war with the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted."

5. A defendants' exhibit, a letter from Bokat to plaintiffs' counsel states, in part, "I had assumed for example, that because of the credibility problems you stated were involved, that a hearing before a new Trial Examiner would have to be *de novo* and is what you desired. . . . I certainly did not intend to suggest to you and the other parties in my letter of January 7, 1963, wherein it was clarified beyond doubt that Mr. Reyman was withdrawing as the Trial Examiner, that the parties of necessity would have to begin again from scratch. I am sure that this is something that can be explored by the Trial Examiner and resolved with the cooperation of the parties at the opening of the hearing on January 22, 1963."

In *Vapor Blast* we pointed out (280 F. 2d 205 at 209) that:

> "... [M]erely raising a constitutional issue [as to Board procedures] in its complaint for declaratory judgment, when full appellate review of the administrative proceedings is available and in the absence of any extenuating circumstances, is insufficient to give the district court jurisdiction over the subject matter in the face of the well-established doctrine of exhaustion of administrative remedies."

An allegation of unconstitutional harm is insufficient to warrant equitable intervention where pursuit of administrative remedies might ultimately render judicial disposition of such issues unnecessary. In an analogous situation in *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U. S. 752, 772 it was observed that:

> "... the very fact that constitutional issues are put forward constitutes a strong reason for not allowing this suit either to anticipate or to take the place of the Tax Court's final performance of its function. When that has been done, it is possible that nothing will be left of appellant's claim."

And, the principle which requires administrative finality as a prerequisite to judicial review has particular force where, as here, the interlocutory order sought to be reviewed relates to the agency's case-handling procedures. *United Air Lines, Inc.* v. *Civil Aeronautics Board* (C.A. D.C.), 228 F. 2d 13.

Nor does the record before us disclose the existence of any "extenuating circumstances" which warrant departure from the well-established principle applied in the cases above cited. No factor such as that which existed in *Leedom* v. *Kyne*, 358 U. S. 184, relied upon by plaintiffs, is present here. The basis for the exception formulated in *Kyne* was that the party adversely affected by the Board's action could not secure ultimate judicial review thereof under the Act's review provisions. *Kyne* involved a repre-

sentation determination not of itself subject to review. The Supreme Court pointed out (358 U. S. 184 at 190) that in the absence of federal district court jurisdiction the employees involved had no other means within their control to protect and enforce the right Congress had given them. No such situation obtains in the instant case—nor any comparable factor. *Kyne* merely establishes a limited exception to the general rule excluding district court jurisdiction.[6]

Deering-Milliken, Inc. v. *Johnston*, 4 Cir., 295 F. 2d 856, also relied upon by plaintiffs, is not apposite here. There the employer brought suit under Section 10(e) of the Administrative Procedure Act (5 U.S.C.A. § 1009(e)) to "compel agency action . . . unreasonably delayed." The holding is expressly rested on the factor that unreasonable delay by its very nature constitutes "final" administrative action for which Section 10(f) of the National Labor Relations Act affords no redress by judicial review. In the instant case, plaintiffs' complaint neither charges unreasonable delay nor alleges facts from which an inference of unreasonable delay attributable to the Board can be drawn.

The judgment order of the District Court is reversed.

REVERSED.

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[6] *Cf. McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U. S. 10, where (pp. 16-17) the limited scope of Kyne was recognized and the Court cautioned that its action was "not to be taken as an enlargement of the exception in *Kyne*." See also: *Eastern Greyhound Lines* v. *Fusco*, 6 Cir., 323 F. 2d 477, 479, holding that unless an employer can bring itself within the limited exceptions of *Kyne* its challenge to a Board's election or certification orders can be made only when enforcement or review is sought. The Court refused to follow *Boire* v. *The Greyhound Corporation*, 5 Cir., 309 F. 2d 397 (affirming, *per curiam*, 205 F. Supp. 686) certiorari granted 372 U. S. 964.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

Tuesday, February 18, 1964.

Before:

Hon. John S. Hastings, Chief Judge.
Hon. Latham Castle, Circuit Judge.
Hon. Roger J. Kiley, Circuit Judge.

CHICAGO AUTOMOBILE TRADE ASSOCIATION, *et al.*,
Plaintiffs-Appellees,

No. 14263 *vs.*

ROSS M. MADDEN, Regional Director, Thirteenth Region, National Labor Relations Board, *et al.*,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment order of the said District Court in this cause appealed from be, and the same is hereby, REVERSED, in accordance with the opinion of this Court filed this day.

UNITED STATES DISTRICT COURT,

Northern District of Illinois,

Eastern Division.

CHICAGO AUTOMOBILE TRADE ASSOCIATION, *et al.*,
Plaintiffs,
vs.
ROSS M. MADDEN, Regional Director of the National Labor Relations Board, *et al.*,
Defendants.
} No. 63 C 114.

MEMORANDUM, FINDING OF FACTS, CONCLUSIONS OF LAW, ORDER AND JUDGMENT.

This is an action by the Chicago Automobile Trade Association (herein referred to as the Association) and seven of its members against the Regional Director for the Thirteenth Region of the National Labor Relations Board, the Board's Chief Trial Examiner, an unnamed Trial Examiner, and three Board attorneys assigned to the Thirteenth Region. The plaintiffs seek to enjoin the defendants from proceeding with a trial *de novo* against plaintiffs in a consolidated unfair labor practice case now pending before the N. L. R. B. The plaintiffs also pray for an order directing defendant George Bokat, the Board's Chief Trial Examiner, to re-assign Trial Examiner Arthur Reyman, in concert with another Trial Examiner if necessary, to complete hearing and, alone, to prepare and issue an Intermediate Report in the cases which were recessed *sine die* by Reyman on December 12, 1962.

The defendants have moved to dismiss the complaint against them on the grounds that: (a) the Court is without jurisdiction over the subject matter of the action; (b) the complaint fails to state a claim upon which relief can be granted; and (c) plaintiffs have failed to make proper service upon defendant George Bokat, Chief Trial Examiner for the Board, who is an indispensable party to this action. In the alternative, defendants have moved that summary judgment be entered in their favor under Rule 12(b), F. R. C. P.

The facts are as follows: On May 4, 1962, after investigation of unfair labor practice charges filed by two unions recently certified as bargaining agents for employees of five of the plaintiffs herein, the Regional Director issued separate complaints against each of these five employers. The complaints alleged that these employers had committed and were committing unfair labor practices. On May 4, the Regional Director issued an order directing that the consolidation of these separate cases was necessary to effectuate the policies of the National Labor Relations Act, and scheduling a consolidated hearing.

On June 13, 1962, after investigation of unfair labor practice charges filed by the two certified unions, the Regional Director issued a complaint against the Association. The complaint alleged that the Association was committing unfair labor practices by assisting and inducing some of its members (namely, the five employers against whom complaints had already issued) to refuse to bargain with the charging unions. On June 22, 1962, the Regional Director issued an order consolidating the complaint against the Association with the cases previously consolidated, and scheduled the matter for hearing. On July 30, 1962, hearing on the consolidated cases opened before Trial Examiner Reyman in Chicago. At the start of the hearing, the Trial Examiner granted the Association's motion to dismiss the

complaint against it. However, on immediate appeal by the General Counsel to the Board, the Board reversed the Trial Examiner's ruling, and ordered that the complaint against the Association be reinstated and evidence heard on the allegations therein. The hearing then continued on the consolidated cases. On October 5, 1962, a complaint was issued against plaintiff Kole. On October 25, 1962, a complaint was issued against plaintiff Grill-Sadler. They were not parties to the initial unfair labor practice charges and a hearing on their charges was scheduled separately and independently of the previously consolidated cases.

On December 12, 1962, when the consolidated proceeding had accumulated about 1,900 pages of transcript and 100 exhibits, Trial Examiner Reyman adjourned the hearing *sine die*. Most of the testimony contained in the record had been elicited by the Board as adverse party testimony.

On January 4, 1963, defendant Madden issued an order consolidating the Kole case with the other cases previously consolidated and adjourned. On January 11, 1963, a similar order was issued similarly consolidating the Grill-Sadler case.

On January 7, 1963, Chief Trial Examiner Bokat, wrote all the parties in the consolidated cases that he had received Trial Examiner Reyman's "notice of disqualification, as provided for in Section 102.37 of the Board's Rules and Regulations." Bokat enclosed a copy of the Trial Examiner's notice, wherein Mr. Reyman had indicated that he was "deeming (himself) to be disqualified to further continue as Trial Examiner for reasons concerning (his) personal health, as reflected by the stenographic transcript of the proceedings of December 12, 1962, pp. 1702-1704." Bokat, therefore, informed the parties that he would designate another Trial Examiner and that a trial *de novo* would commence on the consolidated cases on January 15, in Chicago, Illinois.

On January 9, plaintiffs' counsel here and in the unfair labor practice cases before the Board, wrote Chief Trial Examiner Bokat requesting that he reconsider his designation of another Trial Examiner, and his rescheduling of a hearing *de novo* on the consolidated cases. On January 14, the Regional Director rescheduled the hearing on the consolidated cases from January 15 to January 22. On January 18 plaintiffs filed the present complaint.

Defendants' contention that plaintiffs have failed to serve an indispensable party, George Bokat, Chief Trial Examiner of the Board, is without merit. A necessary or indispensable party as distinguished from a proper party is one who has such an interest in the controversy that a complete decision would be both unjust and impossible without him. The facts before me clearly indicate that I may proceed to judgment on the merits in this cause without the necessary joining of Bokat as a party defendant. Moreover, on January 23, defendants' counsel represented to this court that he was appearing in behalf of the defendants. No exception was made as to Bokat who was named a party defendant in the complaint. It is through this same counsel that Bokat is now questioning the court's jurisdiction over him. Bokat has, since his objection to this Court's jurisdiction, been served a copy of the complaint and summons by certified mail pursuant to the suggestion of defendants' counsel.

Considering defendants' contentions that the court lacks jurisdiction over the subject matter of this action and that the complaint fails to state a claim upon which relief can be granted, there is indeed some question as to the jurisdiction of district courts to entertain suits such as this wherein a plaintiff seeks to enjoin Board action in the labor field. As a general rule plaintiffs who complain of the conduct of administrative bodies have properly been required to exhaust their administrative remedies prior to in-

voking the intervention of the courts. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41. However, this general rule appears to be subject to certain exceptions. The Supreme Court in *Leedom* v. *Kyne*, 358 U. S. 184, recognized the possibility of such an exception. Although the facts in *Leedom* are not identical to the facts presently before me (the conduct of the Board there complained of related to representation matters under Sec. 9 of the Act), the Court clearly held that under certain circumstances district courts do have jurisdiction to enjoin actions of the Board notwithstanding a failure by the plaintiff to have exhausted administrative remedies. Our own Court of Appeals in *Vapor Blast Manufacturing Co.* v. *Madden*, 280 F. 2d 205, by way of dicta recognizes the possibility of exceptions to the general rule. Although the Court, on the basis of the facts before it, held that the District Court did not have jurisdiction, at page 209 it conditioned its ruling with the phrase ". . . in the absence of any extenuating circumstances . . ." Also, the Fourth Circuit Court of Appeals in *Deering Milliken, Inc.*, v. *Johnston*, 295 F. 2d 856, a case factually somewhat similar, but, not identical to this held, that the District Court did, under certain circumstances, have jurisdiction to enjoin the Regional Director of the National Labor Relations Board from proceeding with hearings ordered by the Board. There, as here, the Board was conducting an unfair labor practice proceeding. The Court held that the Board's violation of the Administrative Procedure Act in failing to proceed with reasonable dispatch to conclude the matter before it, and the arbitrary and oppressive nature of its action, justified the District Court in taking jurisdiction notwithstanding nonexhaustion of administrative remedies.

Thus, it is obvious that there are exceptions to the general rule that, where a complainant has failed to exhaust his administrative remedies the district courts cannot take

jurisdiction over complaints alleging improprieties in administrative hearings. My study of the aforementioned decisions leads me to conclude that in order to justify the existence of injunctive jurisdiction in the district courts the complaint must allege and the facts must show, first, that the actions of the Board were in excess of its authority or went beyond limitations otherwise imposed upon it; second, the natural and probable result of the above conduct must be irreparable injury to the plaintiff; and third, it must be shown that plaintiff lacks an adequate administrative or judicial remedy.

I find that the facts in this case satisfy all of the above requirements. Section 5(c) of the Administrative Procedure Act (5 U. S. C. § 1004(c)) in its regulation of administrative agencies such as the Board, provides, that the ". . . same officers who preside at the reception of the evidence pursuant to Section 7 shall make the initial decision required by Section 8 except where such officers become unavailable to the agency." The facts before me are that Trial Examiner Reyman who conducted the hearings, received the evidence, and recessed the hearings *sine die*, has since been assigned to and has conducted other Board hearings. Thus, the evidence demonstrates that Trial Examiner Reyman is still available to the Board, and that in accordance with the above statutory language he must decide the outcome of the hearings, if they are to be decided. Moreover, even if I were to accept the Board's contention, wherein it attempts to avoid the above statutory mandate by suggesting that Trial Examiner Reyman is not available to perform his duties due to illness, still I would have to find that such illness, allegedly the result of tension, clearly was caused entirely by the actions and conduct of Attorney Albert Gore at the hearings. A transcript of the hearings before Trial Examiner Reyman immediately prior to his recessing the hearings *sine die*

indicates beyond any doubt that throughout the hearings he felt he had been "abused personally" and had "been insulted by counsel." There is no question but that he was referring only to Mr. Gore. Thus, any sickness due to tension Trial Examiner Reyman may now have was caused by what he felt to be the contemptuous and obstreperous conduct of attorney Gore. Mr. Gore represents a union against whom the Association and the dealers allegedly committed their unfair labor practices. Although in my mind there is some question as to Mr. Gore's standing and his right to actively appear at the hearings, in any event, he did appear, and his appearance was not only condoned but favored by the Board. In effect the Board was advocating the alleged rights of Mr. Gore's union. It would indeed be unjust and inequitable now to permit the Board to avoid the provisions of the Administrative Procedure Act by claiming the existence of a sickness which it caused. It is only fair also to observe that in my opinion the Board's action here in question was occasioned not so much by its solicitude for the Trial Examiner's health as by its fear of his unfavorable decision were he permitted to resume the case.

The existence of irreparable injury to the plaintiffs is manifestly patent. Plaintiffs, unless this court intervenes, will be required again to spend both time and money in defending against the same charges. Although this fact in and of itself might not "shock the conscience of the court", the possibility is now present that the Board, if it once more appears that still another Trial Examiner favors the defending party, might again cause the hearings to be recessed *sine die*. Such conduct is shocking, to say the least. Also, the Board's Rules which deny to the parties what would otherwise appear to be a right to discovery in such unfair labor practice cases, would in this instance create a manifest injustice to the

plaintiffs if the charges against them were retried. A great deal of the transcript consists of adverse party testimony by plaintiffs' witnesses interrogated by the Board. Were a subsequent trial *de novo* to be conducted plaintiffs would now be at an unfair disadvantage in that the Board would, in effect, have obtained that which it would deny plaintiffs, the right to discovery.

Plaintiffs not only lack an adequate administrative remedy, but, it is entirely possible that they lack any remedy at all. Review of Board action in unfair labor practice cases applies only to its final orders. There is no right to interlocutory appeal. Should the plaintiffs be now forced to again represent themselves at a *de novo* hearing, and should the Board prematurely terminate those hearings, as they have here, or if the findings of the Board are not adverse to the plaintiffs, then the present action of the Board now before me would be unappealable. On the other hand, if the Board were to conduct the *de novo* hearing and enter a final order finding the plaintiffs guilty of committing unfair labor practices, and if plaintiffs then availed themselves of their recourse in the Court of Appeals, and if the Court of Appeals found, as I now find, that the actions of the Board contravened the Administrative Procedure Act, that Court still could not redress the present wrong. It could only refuse to enjoin what the Board had held were unfair labor practices by the plaintiffs. Thus, not only a second but a third trial on the merits of this case would be necessary.

Parenthetically, I might comment on what would appear to be an attempt by the Board to avoid making a final decision on what seems to be the deciding legal issue involved in all of these cases—whether an automobile salesman is or is not a supervisor within the meaning of the Act. This is not the first time I have been called upon to adjudicate a matter related to this same basic dispute be-

tween these same parties. Although, due to the limited nature of the litigation before me, I have not been fully exposed to all of the facts concerning these disputes, it seems to me that the entire controversy could be quickly and finally resolved by deciding this single legal issue relating to the status of automobile salesman. If this is, as I suspect, the situation, then it would behoove the Board to reach a final decision on this dispositive issue as soon as possible. I express my own hope that this will be done.

The futility of plaintiffs' position is apparent. If there is anything left of the inherent equity powers of the District Court, then I cannot now give judicial approbation to the Board's actions, nor can I stand by and permit this grossly unjust situation to continue and develop within my District, mindful though I am of the general legislative policy against court intervention in labor disputes. To force plaintiffs to submit to a *de novo* hearing in light of the present facts would be to abrogate the fundamental principles of equity which I am sure the Congress never intended. I must and I do assume jurisdiction herein.

Accordingly, I hereby enjoin and restrain the National Labor Relations Board, its officers, employees and agents from conducting a trial *de novo* of the present unfair labor practice hearing against the plaintiffs. I hereby further order and direct the said Board and its Chief Trial Examiner to re-assign Trial Examiner Arthur Reyman to reopen the hearings he recessed *sine die* on December 12, 1962, to complete the same and to prepare and issue his Report on the cases herein at whatever time and date within one year hereafter, he, in his sole discretion, shall determine he is able so to do.

/s/ CAMPBELL,
Chief Judge.

Date: April 11, 1963.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

No. 14263

CHICAGO AUTOMOBILE TRADE ASSOCIATION, et al., *Plaintiffs-Appellees*, vs. ROSS M. MADDEN, Regional Director, Thirteenth Region, National Labor Relations Board, et al., *Defendants-Appellants*.	Appeal from an Order of the United States District Court for the Northern District of Illinois, Eastern Division.

PETITION FOR REHEARING.

MAY IT PLEASE THE COURT:

We respectfully request a rehearing and reversal of the Court's decision.

The Court has, we submit, erroneously concluded that the District Court lacked jurisdiction of the subject matter and that it was unnecessary to consider and discuss the merits of the contentions advanced by the plaintiffs, or the conclusions of the District Court, with respect to the withdrawal of Trial Examiner Reyman and the rescheduling of the consolidated unfair labor practice cases before the Board for a *de novo* hearing before another trial examiner (page 3 of slip opinion).

We submit that the merits and the jurisdictional fact question in the instant case are intimately related and inextricably interwoven. These facets cannot be separated, logically or equitably. In fact, it appears implicit in por-

tions of the Court's opinion that it was inclined toward this persuasion.[1] Yet, the Court explicitly stated elsewhere in its opinion that it considered it unnecessary to consider, or even to discuss, the merits of the contentions advanced by the plaintiffs, or the conclusions reached by the District Court. Had the Court considered the jurisdictional fact question and the merits in tandem, as did the District Court in its fully considered and well reasoned opinion, the conclusion reached by this Court with regard to the question of jurisdiction would undoubtedly have been different than the result that was reached by this Court.

A consideration of the merits of the contentions advanced by the plaintiffs and the conclusions reached by the District Court make it clear, we submit, that the District Court *did* have jurisdiction over the subject matter. There can hardly be any question regarding the fact that plaintiffs are threatened with irreparable injury if the Board is permitted to reschedule the consolidated cases for a *de novo* hearing before another trial examiner (P. B. 38-44).[2] The District Court so concluded (B. A. 103-105),[3] even though its conclusions in this respect were more restrictive in scope than the facts comprising the record would have warranted (P. B. 38-44). The manifest unfairness and the serious consequences of such irreparable injury to the plaintiffs is evident from a consideration of the merits, an exercise which we urge this Court to engage in

1. At one point in its opinion, the Court stated that: "We perceive nothing in this record before us which removes this case from the application of the doctrine expressed in *Myers* and applied by this Court in *Vapor Blast*" (page 3 of slip opinion); at another point, the Court stated that the record before the Court did not disclose the existence of any "'extenuating circumstances'" warranting departure from the doctrine of exhaustion of administrative remedies (page 4 of slip opinion).

2. P. B. refers to plaintiffs' brief filed with the Court.

3. B. A. refers to the Board's appendix to its brief filed with the Court.

The irreparable injury to be inflicted upon plaintiffs through a trial *de novo* before a new trial examiner clearly makes the review procedure under Sections 10(e) and (f) of the National Labor Relations Act inadequate. Such injury cannot possibly be obviated in the absence of equitable intervention by the District Court (P. B. 44-49). The denial of judicial review until sometime *after* the Board has inflicted irreparable injury upon the plaintiffs, an inevitable result in the absence of district court intervention, only serves to highlight the patent inadequacy of the review procedure available to plaintiffs under Sections 10(e) and (f) of the National Labor Relations Act.

The Court implies that it believes the Board's allegations that there may be nothing left of the issues raised by plaintiffs if judicial intervention is denied now and the administrative proceedings are allowed to run their course (pages 2 and 3 of slip opinion). If the plaintiffs are now to be subjected to serious irreparable injury through Board conduct sought by the plaintiffs to be enjoined, there does admittedly exist a possibility that the plaintiffs will thereafter elect to suffer in posthumous silence the present harm about to be done them. After all, there would appear to be little point for the plaintiffs to raise issues upon review incident to Sections 10(e) and (f) of the National Labor Relations Act which had become mooted as a consequence of irreparable injury *presently* inflicted upon the plaintiffs. The Court could not *then* remedy the harm done *now*. To that extent, then, this Court has correctly observed that there may ultimately be nothing left of the issues raised by plaintiffs in the District Court. We feel certain, however, that this Court did not intend that plaintiffs should now suffer irreparable injury as a consequence of the Board's conduct, and to have judicial disposition of the issues incident to such injury mooted *only* because there may be no further need thereafter to seek judicial review

in relation to such issues because the fact of irreparable injury exists as a *fait accompli*.

Had this Court considered the merits in conjunction with the jurisdictional fact question, there would have appeared little doubt that *Deering-Milliken, Inc.* v. *Johnston*, 295 F. 2d 856 (C. A. 4) *is* analogous here. In that case it was recognized that certain Board conduct by its very nature constituted "final" administrative action for which Section 10(f) of the National Labor Relations Act affords no redress by judicial review. The very nature of the Board's conduct is no different in the case before this Court. Because of the irreparable nature of the injury threatened plaintiffs, the very nature of the Board's conduct in the instant case is as "final" as was the Board's conduct in the *Deering-Milliken* case.

Had this Court considered the merits of the contentions advanced by the plaintiffs or the conclusions reached by the District Court in connection with the jurisdictional fact question, we submit that the Board's violation of Sections 11 and 5(c) of the Administrative Procedure Act (5 U. S. C. A. 1010 and 1004(c)) would have become readily apparent (P. B. 29-37; B. A. 103-104). The legislative history and relevant case law leave little doubt that Section 5(c), at least, was interdicted by the Board's conduct in designating another trial examiner in the place and stead of Trial Examiner Reyman to conduct a hearing *de novo* of the consolidated cases before the Board (P. B. 29-37). Furthermore, Section 11 of the Administrative Procedure Act, which involves constitutional considerations, appears also to have been interdicted by the Board's conduct, if procedural due process retains any meaning whatever.

Had this Court considered the merits of the contentions advanced by the plaintiffs or the conclusions of the District Court, the apparent violations of the Administrative Procedure Act by the Board would *a fortiori* need be con-

sidered with the admonition of the United States Supreme Court found in *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, wherein the Court stated at pages 40-41:

> . . . it would be a disservice to our form of government and to the administrative process itself if the courts should fail, *so far as the terms of the Act warrant*, to give effect to its *remedial* purposes where the evils it was aimed at appear. [Emphasis added.]

In the same decision at page 45, the Court admonished even more strongly that:

> It is the *plain duty* of the courts, regardless of their views of the wisdom or policy of the Act, to construe this *remedial* legislation to eliminate, *so far as its text permits*, the practices it condemns. [Emphasis added.]

Because of the Board's violation of the Administrative Procedure Act, and in context with the emphatic and unequivocal expressions of the Supreme Court, which has charged the federal courts with a *duty* to redress violations of the Act when engaged in by administrative agencies, we submit that this Court, had it considered the merits of the appeal before it, would certainly have sanctioned the assertion of equitable jurisdiction by the District Court along with the relief fashioned by it. As the Supreme Court has aptly indicated, it is not only the duty, but the "plain duty" of the federal courts to fashion relief on behalf of parties aggrieved by administrative action which interdicts the Administrative Procedure Act. *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 45.

This Court has indicated in its opinion that *Leedom* v. *Kyne*, 358 U. S. 184, because of the factors found therein, precludes the exercise of jurisdiction by the District Court in the instant case (pages 4-5 of slip opinion). This Court states in its opinion that "in the absence of federal district court jurisdiction the employees involved [in *Kyne*] had no other means within their control to protect and enforce

the right Congress had given them," but that this factor was not present in the instant case (page 5 of slip opinion). However, because of the serious irreparable injury threatened to be inflicted upon the plaintiffs *as a consequence* of the Board's violation of the Administrative Procedure Act, we submit that the plaintiffs in the instant case are *equally* without means within their control to protect and enforce the right Congress has given them. In fact, the Supreme Court, as we have already pointed out, has even imposed upon the federal courts a *duty* to construe the *remedial* legislation encompassed in the Administrative Procedure Act to eliminate, so far as its text permits, practices it condemns. *Wong Yang Sung*, 339 U. S. 33, 45.

Finally, the Court cites *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U. S. 10, 16-17, as support for the proposition that *Kyne* merely established a "limited exception" to the general rule excluding district court intervention (page 5 of slip opinion). The instant case falls within the ambit of that "limited exception", for there is no attempt made here by the plaintiffs to enlarge the exception in *Kyne*. Just as in *Kyne*, the plaintiffs in the instant case, because of the irreparable injury threatened them as a consequence of the Board's violation of the Administrative Procedure Act, are without redress by judicial review in the absence of district court intervention. Thus, just as in *Kyne*, and in the *exact image of Kyne*, the plaintiffs are truly without means within their control to protect and enforce the right Congress has conferred upon them in the Administrative Procedure Act.

Conclusion.

The plaintiffs respectfully submit that the Court, because it failed to consider the merits in the instant case as intimately related and inextricably interwoven with the jurisdictional fact question, incorrectly concluded that the District Court was without jurisdiction of the subject matter. For this reason, as we have more fully explicated above, we further submit that the Court has incorrectly reversed the judgment of the District Court. We request, therefore, that a rehearing be granted on the question of the scope of the review granted plaintiffs.

Respectfully submitted,

Frederick W. Turner, Jr.,
Karl W. Grabemann,
134 S. LaSalle Street,
Chicago 3, Illinois,
Attorneys for Chicago Automobile Trade Association, et al.

APPENDIX B.

The relevant provisions of the Administrative Procedure Act (60 Stat. 237, 5 U. S. C. 1004, *et seq.*) are as follows:

SEC. 5. * * *

(c) * * * The same officers who preside at the reception of evidence pursuant to section 7 shall make the recommended or initial decision required by section 8 except where such officers became unavailable to the agency. * * *

The relevant provisions of the National Labor Relations Act, as amended, (61 Stat. 136, 73 Stat. 519, 29 U. S. C. 151, *et seq.*), are as follows:

SEC. 10. * * *

(e) The Board shall have power to petition any court of appeals of the United States, * * * within any circuit * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been

urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. * * * Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the * * * Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems

just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 1060

CHICAGO AUTOMOBILE TRADE ASSOCIATION, ET AL., PETITIONERS

v.

ROSS M. MADDEN, REGIONAL DIRECTOR, THIRTEENTH REGION, NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 23–28) is reported at 328 F. 2d 766. The decision of the district court (Pet. 30–38) is reported at 215 F. Supp. 828.

JURISDICTION

The judgment (Pet. 29) of the court of appeals was entered on February 18, 1964, and petitioners' application for rehearing (Pet. 39–45) was denied on April 4, 1964 (Pet. 2). The petition for a writ of certiorari was filed on May 2, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the agency's designation of a new Trial Examiner to complete an unfair labor practice case may be reviewed in an independent suit in the federal district court where the statute provides for review in the court of appeals after a final order has been entered.

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), and the Administrative Procedure Act (60 Stat. 237, 5 U.S.C. 1001, *et seq.*) are set forth in the petition (Pet. 46–48) and in the Appendix, *infra*, pp. 10–11. The relevant provisions of the Board's rules and regulations are set forth in the Appendix, *infra*, p. 11.

STATEMENT

The underlying facts, as they appear from the pleadings and exhibits in the district court, are as follows:

In the summer of 1962, the Board's Regional Director issued complaints alleging that petitioners had committed unfair labor practices in violation of the National Labor Relations Act (B.A. 13–80).[1] The complaints were consolidated for hearing, which commenced on July 30, 1962, before Trial Examiner Arthur E. Reyman (B.A. 4–6). However, on December 12, 1962, the Trial Examiner adjourned the hearing *sine die* on the ground that the nature of the consolidated proceedings had become such that he

[1] "B.A." refers to the separate appendix to the Board's brief in the court below and filed with the petition.

could not "physically keep up with it" and on the "basis of his personal health" (B.A. 5, 82–83).

On January 7, 1963, the Board's Chief Trial Examiner, George Bokat, wrote petitioners that he had received the Trial Examiner's "notice of disqualification, as provided in Section 102.37 of the Board's Rules and Regulations."[2] Bokat enclosed a copy of the notice, wherein Reyman indicated that he was "deeming [himself] to be disqualified to further continue as Trial Examiner for reasons concerning [his] personal health, as reflected by stenographic transcript of the proceedings of December 12, 1962, pp. 1702–1704." Bokat, therefore, informed the parties that he would designate another Trial Examiner and that a trial *de novo* would commence on the consolidated cases on January 15, 1963 (B.A. 5–6, 9, 84–88).[3]

On January 9, Frederick W. Turner, Jr., petitioners' counsel, wrote Chief Trial Examiner Bokat requesting that he reconsider his designation of another Trial Examiner, and his scheduling of a hearing *de novo* on the consolidated cases (B.A. 6, 88–91). After receiving Turner's letter, Bokat discussed with

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[2] Section 102.37 (29 C.F.R. 102.37), *infra*, p. 11, incorporates Section 7(a) of the Administrative Procedure Act (5 U.S.C. 1006(a)), *infra*, p. 10, which provides that a hearing "officer may at any time withdraw if he deems himself disqualified * * *."

[3] The Board's rules delegate to the Chief Trial Examiner the Board's statutory authority (Section 10(b) of the Act, *infra*, p. 10) to designate Trial Examiners to conduct hearings, including the authority to designate a Trial Examiner "to take the place of the trial examiner previously designated to conduct the hearing" (Section 102.34, 29 C.F.R. 102.34, *infra*, p. 11).

Reyman the possibility of the latter's return to conclude the hearing (B.A. 84, 94). On January 11, at Bokat's suggestion, Reyman went to his doctor for a medical opinion. The doctor found that Reyman "has elevated blood pressure (essential hypertension); and [that his] blood pressure was considerably elevated." (B.A. 95, 97). The doctor therefore advised him not to undertake work on the Chicago Automobile Trade Association case (B.A. 97). As a result of this report, Reyman decided to adhere to his withdrawal from the case (B.A. 84, 94–96).

On January 15, Counsel Turner wrote Bokat reiterating petitioners' opposition to a trial *de novo* before a new Trial Examiner (B.A. 6, 91–93). On January 16, Bokat replied. He again explained to Turner why Reyman could not resume the hearing, and told him of the results of Reyman's medical examination. Bokat added that he had assumed, on the basis of their earlier telephone conversations, that "because of the credibility problems [which] were involved, a hearing before a new Trial Examiner would have to be de novo and is what [petitioners] desired." However, Bokat concluded that the question of the scope of the new hearing was "something that can be explored by the Trial Examiner and resolved with the cooperation of the parties at the opening of the hearing on January 21, 1963." (B.A. 93–94.)

On January 18, petitioners filed suit in the district court against the Board's Regional Director, Chief Trial Examiner Bokat, an unnamed Trial Examiner, and three Board attorneys assigned to the Board's Thirteenth Region (B.A. 3–5). The complaint al-

legal that, as Trial Examiner Reyman was currently hearing other Board cases,[4] he was not "unavailable" within the meaning of Section 5(c) of the Administrative Procedure Act (5 U.S.C. 1004(c))[5], and that thus the designation of another Trial Examiner to take over the unfair labor practice hearing violated that section (B.A. 7). Petitioners sought injunctive relief requiring the redesignation of Reyman to complete the Board hearing (B.A. 7-8, 11-12). The Board moved to dismiss the complaint, or, in the alternative, for summary judgment, on the ground, *inter alia*, that the district court lacked jurisdiction over the subject matter (B.A. 12-13).

On April 11, 1963, the district court granted the injunctive relief and denied the Board's motion to dismiss the complaint or for summary judgment (Pet. 30-38). On February 18, 1964, the court of appeals reversed the district court, concluding that it lacked jurisdiction over the subject matter of the action. The court of appeals, finding that the statutory review procedure provided an adequate means whereby petitioners could have their contentions reviewed in the court of appeals, held, on the authority of *Myers* v.

[4] In an affidavit filed in support of the Board's motion to dismiss the complaint, or for summary judgment, Chief Trial Examiner Bokat stated that he had "sought to select 'cases' [for assignment to Reyman] which will not be long and factually complex, and which do not appear to have the potential for generating tension or a 'charged atmosphere' among the participants" (B.A. 84-85, 94-95).

[5] This provision (Pet. 46) states that the "same officers who preside at the reception of the evidence pursuant to section 7 shall make the recommended or initial decision required by section 8 except where such officers become unavailable to the agency."

Bethlehem Shipbuilding Corporation, 303 U.S. 41, that that procedure could not be circumvented by a district court suit (Pet. 23–28).

ARGUMENT

The decision of the court below is correct and in accord with settled authority. No issue warranting review by this Court is presented.

1. Petitioners' basic contention is that the Board, by removing Trial Examiner Reyman from the hearing of their case, authorized a violation of the requirement of Section 5(c) of the Administrative Procedure Act that the same officer who hears the evidence shall make the initial decision; the exception, petitioners say, is inapplicable because an examiner who can hear other cases is not "unavailable to the agency" (Pet. 16).

The National Labor Relations Act provides a procedure whereby a contention such as this may be adjudicated. Petitioners may challenge the propriety of the designation of a new Trial Examiner at the time the hearing recommences. At that time, the Board, if it accepts their contention, may order a new hearing. Only if the Board rejects the contention, allows the original hearing to proceed, and ultimately issues an unfair labor practice order, will petitioners be adversely affected, and in that event they may raise the present issue again in the court of appeals on review of that order under Section 10 (e) or (f) of the Act (set forth at Pet. 46–48). Since petitioners incur no legal liability while pursuing this course, settled principles require that the procedure be exhausted and that it not be circumvented by an independent

equity suit in the district court. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41; *Newport News Co.* v. *Schauffler*, 303 U.S. 54; *Vapor Blast Mfg. Co.* v. *Madden*, 280 F. 2d 205 (C.A. 7), certiorari denied, 364 U.S. 910.[6] See also, *Allen* v. *Grand Central Aircraft Co.*, 347 U.S. 535; *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U.S. 752; *Macauley* v. *Waterman S.S. Corp.*, 327 U.S. 540.

Nor is a departure from these principles warranted merely because petitioners have alleged a violation of the Administrative Procedure Act (see Pet. 16–17). As this Court has stated, the APA "purports to strengthen, rather than to weaken, the principle requiring the exhaustion of administrative remedies before permitting court review." *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U.S. 492, 499–500. Moreover, Section 10(c) of the APA (5 U.S.C. 1009(c), *infra*, p. 11) expressly provides that preliminary and procedural rulings, such as those involved in this case, are reviewable only when the final agency action is reviewed.

2. *Leedom* v. *Kyne*, 358 U.S. 184, relied on by petitioners (Pet. 17–20), has no application to the instant case. As the court of appeals noted (Pet. 27–28), in *Kyne* the challenged Board action arose in a representation proceeding and "in the absence

[6] It was by exhaustion of the statutory review procedure that adherence to the requirements of the Administrative Procedure Act respecting the substitution of Trial Examiners has been raised in other cases. See *National Labor Relations Board* v. *Dixie Shirt Co.*, 176 F. 2d 969, 971 (C.A. 4); *National Labor Relations Board* v. *Stocker Mfg. Co.*, 185 F. 2d 451, 454 (C.A. 3).

of Federal district court jurisdiction the employees involved had no other means within their control to protect and enforce the right Congress had given them." Petitioners, on the other hand, seek review of a preliminary action in an unfair labor practice proceeding—an action which, as shown above, can adequately be reviewed under the statutory procedure. Moreover, as the Court emphasized this Term in *Boire* v. *The Greyhound Corp.*, 376 U.S. 473, *Kyne* is further limited to situations in which the Board has contravened a clear and specific statutory requirement. No such situation is presented here. Reading the "unavailability" requirement in Section 5(c) of the APA together with the provision in Section 7(c) that a hearing officer may at any time withdraw from a case "if he deems himself disqualified" (*infra*, p. 10), the Board could reasonably conclude that an examiner who withdraws from a particular case for good cause has become "unavailable" within the meaning of Section 5(c) irrespective of his ability to hear other cases. Indeed, this conclusion is consistent with the uniform application given those sections of the APA by the courts of appeals. *National Labor Relations Board* v. *Dixie Shirt Co.*, 176 F. 2d 969, 971 (C.A. 4); *National Labor Relations Board* v. *Stocker Mfg. Co.*, 185 F. 2d 451, 454 (C.A. 3); *Tractor Training Service* v. *F.T.C.*, 227 F. 2d 420, 423 (C.A. 9); *Art National Manufacturers Distributing Co.* v. *F.T.C.*, 298 F. 2d 476 (C.A. 2).

Nor does the decision below conflict with *Deering-Milliken, Inc.* v. *Johnston*, 295 F. 2d 856 (C.A. 4). In that case, the Fourth Circuit concluded that the

district court had jurisdiction to compel agency action unreasonably delayed. But, as the court below noted (Pet. 28), petitioners' "complaint neither charges unreasonable delay nor alleges facts from which an inference of unreasonable delay attributable to the Board can be drawn."

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
GLEN M. BENDIXSEN,
Attorney,
National Labor Relations Board.

JUNE 1964.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*) in addition to those set forth in the petition, are as follows:

> SEC. 10(b). Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: * * *

The relevant provisions of the Administrative Procedure Act (60 Stat. 237, 5 U.S.C. 1001, *et seq.*), in addition to those set forth in the petition, are as follows:

> SEC. 1006. *Hearings; presiding officers; powers and duties.* * * *
>
> In hearings which section 1003 or 1004 of this title requires to be conducted pursuant to this section—
>
> (a) There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this chapter; * * * Any such officer may at any time withdraw if he deems himself disqualified; * * *

SEC. 1009. *Judicial Review of agency action.*

(c) Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. * * *

The relevant provisions of the Board's Rules and Regulations and Statements of Procedure, Series 8, as amended, are as follows:

RULES AND REGULATIONS

HEARINGS

SEC. 102.34 (29 C.F.R. 102.34) *Who shall conduct; * * *.*—The hearing for the purpose of taking evidence upon a complaint shall be conducted by a trial examiner designated by the chief trial examiner in Washington, D.C., or the associate chief trial examiner, San Francisco, Calif., as the case may be, unless the Board or any member thereof presides. At any time a trial examiner may be designated to take the place of the trial examiner previously designated to conduct the hearing. * * *

SEC. 102.37 (29 C.F.R. 102.37) *Disqualification of trial examiners.*—A trial examiner may withdraw from a proceeding whenever he deems himself disqualified. * * *